

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 EASTERN DISTRICT OF CALIFORNIA

3  
4 UNITED STATES OF AMERICA,

5 Plaintiff,

CIV. NO. S-11-0556 EJG  
CR. NO. 03-0549 EJG

6 v.

7 FRANCISCO MEDINA CASTENEDA,

ORDER DENYING MOTION TO  
VACATE, SET ASIDE OR CORRECT  
SENTENCE

8 Defendant.

9 \_\_\_\_\_ /

10 Defendant, a federal prisoner proceeding through counsel,  
11 has filed a motion to vacate, set aside or correct his sentence  
12 pursuant to 28 U.S.C. § 2255. After reviewing the record, the  
13 documents filed in connection with the motion, and the applicable  
14 law, the court has determined it may be decided without an  
15 evidentiary hearing because the files and records of the case  
16 affirmatively show the factual and legal invalidity of  
17 defendant's arguments. Shah v. United States, 878 F.2d 1156,  
18 1158-59 (9<sup>th</sup> Cir. 1989). For the reasons that follow, the motion  
19 is DENIED.

20 Background

21 Defendant was convicted February 23, 2005, following a jury  
22 trial, of conspiracy to distribute and conspiracy to possess with  
23 the intent to distribute cocaine base, cocaine and  
24 methamphetamine, and possession with the intent to distribute  
25 cocaine base, in violation of 21 U.S.C. §§ 841 and 846. He was

1 sentenced May 20, 2005 to a term of 324 months imprisonment and  
2 ten years supervised release. On January 15, 2008, defendant's  
3 convictions were affirmed on appeal; however, the case was  
4 remanded for re-sentencing. United States v. Casteneda, 511 F.3d  
5 1246 (9<sup>th</sup> Cir. 2008.) Defendant was re-sentenced July 18, 2008 to  
6 a term of 262 months imprisonment and ten years supervised  
7 release. An appeal from the amended judgment was denied July 2,  
8 2009 in an unpublished memorandum disposition. A petition for  
9 certiorari was denied March 1, 2010. The instant motion to  
10 vacate, set aside or correct sentence was timely filed February  
11 8, 2011.

## Discussion

13       Defendant's motion raises two claims: ineffective assistance  
14 of counsel, and conflict of counsel.<sup>1</sup> With respect to the first  
15 claim, defendant lists 16 discrete instances which he alleges  
16 constitute ineffective assistance. However, the motion neither  
17 cites applicable law nor demonstrates how the acts or omissions  
18 rise to the level of a constitutional violation.

19 To prevail on a claim of ineffective assistance of counsel,  
20 defendant must demonstrate that counsel's performance was  
21 deficient, and but for the deficiencies, the outcome would have  
22 been different. See generally, Strickland v. Washington, 466  
23 U.S. 668, 104 S.Ct. 2052 (1984). Defense counsel is presumed to

<sup>1</sup> Contrary to the government's assertion, defendant was given leave of court to file his supplemental brief in support of his motion. Docket Entry 192, "Notice", filed March 9, 2011.

1 have acted reasonably and to have provided constitutionally  
2 adequate assistance. Id. 104 S.Ct. at 2065. Moreover, second  
3 guessing of counsel's tactical decisions after conviction cannot  
4 form a basis for a claim of ineffective assistance. See  
5 Strickland, 104 S.Ct. 2065 (counsel's performance must be  
6 evaluated without the "distorting effects of hindsight").

7 The actions and omissions defendant contends were deficient  
8 conduct by his attorney consist of failures to object to certain  
9 facts recited by government witnesses during their testimony,  
10 failure to impeach or clarify testimony of government witnesses,  
11 and failure to present evidence which would have been  
12 exculpatory. Defendant's bald recitation of these instances,  
13 both individually and considered as a whole, without more, does  
14 not demonstrate deficient performance by counsel. Moreover,  
15 defendant has failed completely to explain how and in what manner  
16 the outcome of the proceeding would have been different. For this  
17 reason, the claim of ineffective assistance of counsel fails.

18 Defendant's second claim, like his first, is void of facts,  
19 analysis and law and is similarly unavailing. In this claim  
20 defendant states his belief that his counsel previously  
21 represented potential witnesses in the case. He doesn't name  
22 those persons nor their relationship to either the defendant or  
23 the case. As with his first claim, defendant's second claim is  
24 bereft of facts or evidentiary support and does not state a claim  
25 for relief.

## Conclusion

For the reasons stated above, defendant's motion to vacate, set aside or correct sentence is DENIED. The Clerk of Court is directed to close companion civil case CIV. NO. S-11-0556 EJG.

Certificate of Appealability

6 Pursuant to recent Ninth Circuit authority, the district  
7 court addresses the issue of *certificate of appealability* as part  
8 of the ruling on the post-conviction motion. In a § 2255  
9 proceeding, "an applicant cannot take an appeal unless a circuit  
10 justice or a circuit or district judge issues a certificate of  
11 appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P.  
12 22(b). Such certification may issue "only if [defendant] has  
13 made a substantial showing of the denial of a constitutional  
14 right." 28 U.S.C. § 2253(c)(2). The court must either issue a  
15 certificate of appealability indicating which issues satisfy the  
16 required showing or must state the reasons why such a certificate  
17 should not issue. Fed. R. App. P. 22(b)(1).

18 For all of the reasons stated above, defendant has not made  
19 a substantial showing of the denial of a constitutional right. A  
20 certificate of appealability will not issue.

IT IS SO ORDERED.

Dated: January 25, 2012

/s/ Edward J. Garcia  
EDWARD J. GARCIA, JUDGE  
UNITED STATES DISTRICT COURT